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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2010 AUG -2 PM 3:48
JEANNE HICKS, CLERK
BY: B. Chamberlain

IN THE SUPERIOR COURT OF STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS WITH
PREJUDICE

FILED UNDER SEAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Dismiss with Prejudice and requests that the Motion be summarily denied. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

As has been stated on multiple occasions, the Yavapai County Attorney's Office is dedicated to the fair administration of the law to protect the public and to insure that justice is done. The obligation to the public encompasses all citizens of Yavapai County, including all defendants. Our dedication does not wax or wane with the severity of the charges of any given case, the difficulty of prosecuting a case, or, as has become standard with this case, the ever-increasing animosity on the part of a defense team. Defense counsel has launched an

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1 unprecedented number of unfounded, derogatory, personal and vindictive attacks against the
2 State in this case. Defendant now alleges serious accusations of prosecutorial misconduct
3 claiming the alleged misconduct has been so egregious as to warrant dismissal with
4 prejudice. This, as with so many other accusations made by the defense team, is an
5 exaggeration of what actually transpired.

6
7 ***I. Competency of Defense Counsel***

8 The State agrees that it has been concerned with defense counsel's conduct since the
9 outset of this case. A defense counsel's secreting of evidence in a homicide investigation is
10 somewhat troubling to say the least. Defendant neglects to mention that defense counsel did
11 not turn over the golf club sock until after Defendant was arrested and informed law
12 enforcement that it was in counsel's possession. Defense counsel has since strenuously
13 argued that an anonymous email sent only to him should be admitted as evidence during the
14 trial. The Court denied the State's motion *in limine* to preclude in advance the admission of
15 the email. Of course the State would request that counsel, at a minimum, would lay the
16 foundation for the admission of the unreliable hearsay evidence. Yet, ER 3.7 precludes a
17 lawyer from being a witness in a trial in which the lawyer is also an advocate at trial. This is
18 not a problem of the State's making.

19
20 Ethical rules and case law oblige a prosecutor to see that defendants receive a fair
21 trial. Ariz. R. Sup.Ct. 42, E.R. 3.8, comment; *State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d
22 1352, 1369 (1994); *State v. Rodriguez*, 192 Ariz. 58, 64, ¶ 31, 961 P.2d 1006, 1012 (1998).
23 When the State learned of conduct by defense counsel giving rise to reasonable suspicions of
24 misconduct, the State appropriately brought these issues to the Court's attention *under seal* in
25 the State's Motion for Determination of Counsel. It is imperative that the record in this case
26

1 reflect that the concerns were brought to light, to the Court's attention, to defense counsel's
2 attention and to the attention of Defendant. It is equally important, for the record on appeal,
3 that Defendant and his counsel have waived the issue of competency of counsel.

4 [REDACTED]
5 [REDACTED] It is clear that Defendant's
6 Motion to Dismiss with Prejudice is nothing more than a thinly veiled attempt to intimidate
7 and dissuade the State from pursuing its ethical and legal obligations in this regard.
8

9 The State's concerns are legitimate and based on the facts as known to the State.
10 There has been no "manufacturing" of a conflict "in order to prevent a defendant from having
11 a particularly able defense counsel at his side" as counsel would like this Court to believe.
12 At this point the Court has ruled that defense counsel can continue their representation and
13 the trial has resumed.
14

15 ***II. The State has committed no acts which rise to the level of prosecutorial misconduct.***
16 ***Defendant fails to offer even a single instance of conduct which "infected the trial with***
unfairness."

17 Defendant claims the State attempted to interfere with his right to counsel of choice
18 and deliberately attempted to create a mistrial. Nothing could be further from the truth. At
19 every juncture throughout the 18 months of trial preparation and dozens of pre-trial
20 proceedings, the State has taken what it believed to be the most appropriate action to insure
21 that justice was done. This was done with an eye toward insuring both a fair trial as well as
22 guarding against allegations of ineffective assistance of trial counsel.
23

24 "Determination of whether a particular action is misconduct depends to some extent
25 on the circumstances of the particular case." *Pool v. Superior Court (Pima County)*, 139
26 Ariz. 98, 102, 677 P.2d 261, 265 (1984). Prosecutorial misconduct requiring a mistrial

1 occurs only when the prosecutor's actions were, in fact, misconduct, and were so pronounced
2 and persistent that they permeated the entire trial and probably affected the outcome. *State v.*
3 *Hughes*, 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998); *State v. Atwood*, 171 Ariz. 567, 611,
4 832 P.2d 593, 628 (1992). "To determine whether prosecutorial misconduct permeates the
5 entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of
6 the misconduct." *Hughes*, 193 Ariz at 79, 969 P.2d at 1191. "Prosecutorial misconduct is
7 harmless if [the trial court] can find beyond a reasonable doubt that it did not contribute to or
8 affect the verdict." *Hughes*, 193 Ariz at 80, 969 P.2d at 1192.

9
10 A prosecutor has a duty to see that all defendants receive a fair trial. A requisite to a
11 fair trial is assistance of competent counsel. During his opening statement, defense counsel
12 made the State aware that the victim's life insurance policies had been paid out. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 The State brought those facts,
16 under seal and while trial was in recess, to the Court's attention to determine counsels'
17 competency. The jurors were still under the Court's admonition not to read newspapers or
18 watch news broadcasts or in any way obtain information regarding the trial. The Court
19 issued its ruling and the case is proceeding.

20
21 The State's filing of pleadings related to the insurance issues was proper under the
22 circumstances. This was not an attempt to interfere with Defendant's right to counsel of
23 choice. It was, however, an attempt to ensure that Defendant receives a fair trial and is
24 assisted by competent counsel who are devoid of conflict. To that end, the State strongly
25 urged the Court to appoint independent counsel to review the issue and assist Defendant in
26

1 making an informed, intelligent decision. There are simply no instances of prosecutorial
2 misconduct related to the insurance issue. Defendant's request on that basis must be denied.

3 In an attempt to create a "cumulative effect," Defendant claims nearly every
4 significant action (and sometimes inaction) by the State through all pre-trial preparations and
5 proceedings spanning the 18 months from Defendant's arrest until the beginning of jury
6 selection on May 4, 2010, somehow equates to prosecutorial misconduct. This proposition is
7 seriously flawed, unworthy of serious consideration, and must be rejected.
8

9 Defendant then lists specific instances occurring since Judge Lindberg fell ill he
10 claims prove the State purposefully attempted to delay these proceedings and deliberately
11 create a mistrial. The majority of the list is inextricably linked to the insurance issue and
12 cannot be considered separate instances of conduct.
13

14 One of the other two instances of alleged misconduct unrelated to the insurance issue
15 is the fact the State rejected some of the proposed judges from the list provided by Judge
16 Brutinel. This cannot be held against the State as rejections were invited by Judge Brutinel.
17 Furthermore, this also ignores the fact that the State was also contacting retired judges in an
18 unsuccessful effort to obtain a replacement judge.

19 Also included is the fact the State informed the Court that presentation of its case-in-
20 chief would take significantly longer than originally anticipated. After seven days of
21 testimony only a fraction of the State's witnesses had been heard. The slow-going was also
22 due to the defense team's frequent objections, almost daily pre-trial arguments, numerous
23 side-bars, and extended cross-examination, all of which took significantly longer than
24 expected. For example, Defendant cross-examined Det. Huante over three days. Defendant
25 must also accept responsibility for the increase in the anticipated length of trial.
26

1 There must first be misconduct on behalf of the prosecutor. None can be found. No
2 evidence exists that the prosecution has ever invited a mistrial, while the same cannot be said
3 for the defense.¹ It appears that defense counsel would like a "do over" of their original
4 opening statement.

5 **III. Dismissal with prejudice is inappropriate under the facts.**

6 When considering dismissal with or without prejudice the Court must consider 16A
7 A.R.S. *Rules of Crim. Proc.*, Rule 16.6(d). That rule provides:

9 **d. Effect of Dismissal.** Dismissal of a prosecution shall be without
10 prejudice to commencement of another prosecution, unless the court
11 order finds that the interests of justice require that the dismissal be with
12 prejudice.

13 "Dismissal without prejudice is favored by the rule and there can be no dismissal with
14 prejudice unless the interests of justice require it." *State v. Granados*, 172 Ariz. 405, 407, 837
15 P.2d 1140, 1142 (App. 1991) (*rev. denied* 1992). "[W]e believe that the kind of prejudice
16 which merits a final dismissal can arise out of deliberate harassment or is that kind of prejudice
17 which effects the integrity of the truth finding process." *State v. Mohave County Justice Court,*
18 *Kingman Precinct, (Gardner, Real Party in Interest)*, 141 Ariz. 342, 344, 686 P.2d 1312, 1314
19 (App. 1984). The State is not deliberately harassing Defendant. The State believes Defendant
20 committed murder and is lawfully pursuing a conviction as it is required to do. The jury has not
21 been affected by the State's request for a determination of counsel. It is totally unaware of the
22 State's request that the Court determine counsel's competency to proceed.

23
24
25
26 ¹ Consider defense counsel's repeated questioning of Sgt. Huante on why Defendant did not
answer questions when counsel was well aware that Defendant had previously invoked his
right to remain silent.

1 A dismissal with prejudice requires a balancing between Defendant's and the State's
2 interests. A determination of fundamental fairness includes "assessing the several interests that
3 are at stake." *Villalpando v. Regan*, 211 Ariz. 305, ¶ 8, 121 P.3d 172, 175 (App. 2005) (internal
4 citation omitted). The trial court is not limited to "any specific list of factors they may utilize in
5 deciding whether and in what manner a prosecution should be dismissed under the unique
6 circumstances before them." *State v. Huffman*, 222 Ariz. 416, 422, 215 P.3d 390, 396 (App.
7 2009). However, our courts have looked at other jurisdictions and those jurisdictions'
8 considerations of factors such as the seriousness and circumstances of the offense; extent of
9 harm resulting from the offense; the impact of dismissal on public confidence in the judicial
10 system or on the safety and welfare of the community in the event the defendant is guilty; and
11 the attitude of the victim. *Id.* (quoting, in part, *State v. Sauve*, 164 Vt.134, 140-41, 666 A.2d
12 1164, 1168 (1995)). "The court's duty is satisfied as long as it has considered the relevant
13 competing interests of the defendant and the state in light of the particular circumstances of each
14 case. *Huffman*, 222 Ariz. at 422, 215 P.3d at 396.
15

16
17 While there have been no instances of prosecutorial misconduct, a finding of prosecutorial
18 misconduct alone would not prohibit retrial in any event.

19 We do not read *Pool* as prohibiting retrial any time a mistrial is declared or
20 new trial ordered based upon prosecutorial misconduct. In order to justify a
21 mistrial, the prosecutor's conduct must deny the defendant a fair trial. *Atwood*.
22 But an additional, improper intent to infect the trial with prejudicial error must
23 exist, at least implicitly, in order to justify barring a retrial based upon double
24 jeopardy. *Pool*. Here, the objective facts do not indicate the prosecutor
25 intended to force Trani to either finish a trial infected with error or choose a
26 mistrial. He simply erred, and the error was isolated to a single misstep,
nothing like the pattern of misconduct that "permeated the trial" in both *Pool*
and *Hughes*. We conclude that the trial court abused its discretion.

State v. Trani, 200 Ariz. 383, 386-387, 26 P.3d 1154, 1157 - 1158 (App. 2001) (internal
citations omitted).

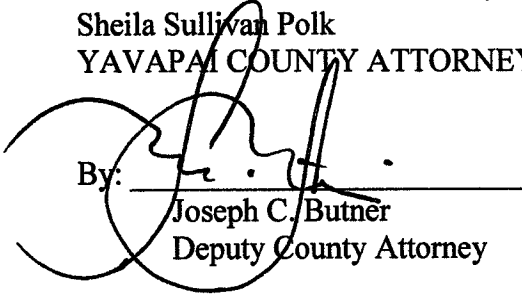
1 There is no evidence that the State has engaged in any misconduct whatsoever.
2 Additionally, after considering the competing interests of both the State and Defendant,
3 dismissal with prejudice is not warranted, not supported by the law, and is not supported by
4 the facts.

5
6 **CONCLUSION**

7 The simple fact is nothing the State has done or said before the jury in this case
8 amounts to even a single instance of prosecutorial misconduct let alone a pattern of
9 misconduct. Defendant's request for a mistrial and dismissal with prejudice must be denied.

10 RESPECTFULLY SUBMITTED this 2nd day of August, 2010.

11 Sheila Sullivan Polk
12 YAVAPAI COUNTY ATTORNEY

13 By: 
14 _____
15 Joseph C. Butner
16 Deputy County Attorney

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1 COPIES of the foregoing delivered this
2 2nd day of August, 2010 to:

3 Honorable Warren R. Darrow
4 Judge of the Superior Court
(via email)

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